Filed 8/29/19 In re D.B. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re D.B., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B293119 (Super. Ct. No. TJ21553) (Los Angeles County)
THE PEOPLE, Plaintiff and Respondent, v. D.B., Defendant and Appellant.	

D.B. appeals the juvenile court's order sustaining a wardship petition on allegations that appellant committed a robbery (Pen. Code, § 211) and an assault by means of force likely to produce great bodily injury (*id.*, § 245, subd. (a)(4)). (Welf. & Inst. Code, § 602.)[1] The court also found that in committing the

[1] All statutory references are to the Welfare and Institutions Code unless otherwise stated.

offenses appellant personally inflicted great bodily injury upon the victim (Pen. Code, § 12022.7, subd. (a)). Appellant was committed to the Division of Juvenile Justice for a maximum period of confinement of five years and four months. The court also ordered him to pay a $1,000 restitution fine in accordance with section 730.6. Appellant contends the evidence is insufficient to establish his identity as the perpetrator of the crimes. He also claims the court violated his due process rights by imposing a restitution fine without first determining his ability to pay (*People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). We affirm.

FACTS AND PROCEDURAL HISTORY

On February 27, 2018, Israel Alvarado cashed in his $500 winning lottery ticket at the store from which he purchased it. He immediately purchased two more tickets at another store. As he left that store he was attacked by a man demanding his winnings as another man simultaneously put him in a "headlock" rendering him unconscious. He awoke lying on the ground having urinated himself. He suffered a cut lip and several of his teeth were broken or loosened. His winnings were gone. The events were captured on a surveillance video.

Three days earlier Los Angeles Police Detective Kevin Raines had arrested appellant and Melvin Walton on an unrelated case. In reviewing an officer's body camera images of that arrest, Raines, who had been assigned to investigate the Alvarado robbery, noted that appellant wore a "distinct" dark hooded sweatshirt that appeared to be identical to one worn by one of Alvarado's assailants as captured on the surveillance video. He described it as having "white drawstrings and . . . a

small white label on the front left chest area and that's depicted in the arrest of [appellant] and then also in the robbery video."

At Detective Raines's request, Officer Francis Coughlin reviewed that video as well as a photograph of appellant and Walton downloaded from Walton's Facebook account on March 6 and appellant's booking photograph from the earlier case. Appellant was wearing the identical sweatshirt in each of the images. At trial, Officer Coughlin identified appellant and Walton as Alvarado's assailants. Although the officer could not discern appellant's facial features on the video, he was "100 percent sure" it was him. Coughlin had seen appellant approximately 100 times before and had 10-15 direct contacts with him prior to the instant case. Coughlin testified that he noticed that appellant "always" had a distinctive gait that was "not in sync," and that his neck and torso tilted forward.

DISCUSSION

Sufficiency of the Evidence

Appellant contends the juvenile court's order must be reversed because the evidence is insufficient to prove his identity as one of the individuals who robbed and assaulted Alvarado. We disagree.

The standard of review of an insufficiency of the evidence claim is the same in juvenile cases as in adult criminal cases: "we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable fact finder could find guilt beyond a reasonable doubt. [Citations.]" (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 540.) "'We must presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence . . . and we must make all

reasonable inferences that support the finding of the juvenile court. [Citation.]' [Citations.]" (*In re Babak S.* (1993) 18 Cal.App.4th 1077, 1089.)

"Apropos the question of identity, to entitle a reviewing court to set aside a jury's finding of guilt the evidence of identity must be so weak as to constitute practically no evidence at all." (*People v. Lindsay* (1964) 227 Cal.App.2d 482, 493.) When the circumstances surrounding an identification and its weight are explored at trial and the trier of fact believes the identification, the trier of fact's determination is binding on the reviewing court. (*In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497.)

At the adjudication hearing, Officer Coughlin testified that based on appellant's distinctive gait and posture, the officer was "100 percent sure" that appellant and Walton were the two assailants depicted in the video footage of the incident. The officer also offered that appellant was wearing the same distinctive sweatshirt he was wearing three days prior to and eleven days after the incident, and that he committed the assault and robbery along with his friend Walton, with whom he also committed the prior robbery.

After viewing the video footage, the court noted that "[appellant] does have a very characteristic walk and it is as the detective testified. . . . [I]t is sort of bowlegged and sort of slouchy and . . . it would be recognizable whether you saw that face or not." The court added that appellant was wearing the same sweatshirt he was wearing when he and his friend Walton committed another robbery three days prior to the instant offenses. It found that "given the totality of the evidence here, . . . the People have proved beyond a reasonable doubt that the person in the dark hooded [sweatshirt] is [appellant], and they

have proved beyond a reasonable doubt that it was [appellant] involved in the robbery [and assault] of Israel Alvarado . . . ."

Sufficient evidence supports the court's ruling. Appellant's assertion to the contrary disregards the standard of review, which compels us to review the evidence in the light most favorable to the judgment. (*In re Matthew A.*, *supra*, 165 Cal.App.4th at p. 540.) Contrary to his claim, Officer Coughlin did not merely make an "assumption" or have a "hunch" that appellant was one of the individuals depicted in the video; indeed, the officer said he was "100 percent" certain of the identification. This identification was sufficient by itself to sustain the juvenile court's finding. (See *People v. Boyer* (2006) 38 Cal.4th 412, 480 ["[i]dentification of the defendant by a single eyewitness may be sufficient to prove the defendant's identity as the perpetrator of a crime"].)

Appellant's citation to *People v. Redmond* (1969) 71 Cal.2d 745, is unavailing. In that case, the victim of a home invasion robbery was unable to identify the defendant in a lineup and testified at trial that he merely "'resemble[d]'" her assailant, whom she did not know. (*Id.* at p. 756.) Appellant was positively identified by Officer Coughlin, who has years of familiarity with appellant's physical features and characteristics. Moreover, there were additional circumstances that supported the identification. Appellant's claim of insufficient evidence thus fails.

Dueñas *and Ability to Pay*

At the dispositional hearing in this matter, the juvenile court imposed a $1,000 restitution fine pursuant to section 730.6, subdivision (a)(2)(A). The court set the restitution amount without objection by appellant and absent express inquiry into

this ability to pay. Relying on the recent appellate decision in *Dueñas*, *supra*, 30 Cal.App.5th 1157, appellant contends the restitution fine must be stayed unless and until the People can show he has the present ability to pay it.

In *Dueñas*, the court concluded that "due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments under Penal Code section 1465.8 and Government Code section 70373." (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1164.) The court also concluded that "although Penal Code section 1202.4 bars consideration of a defendant's ability to pay *unless the judge is considering increasing the fee over the statutory minimum*, the execution of any restitution fine imposed under this statute must be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine." (*Ibid.*, italics added.)

Appellant argues that, by analogy, the restitution fine imposed on him by the juvenile court must also be stayed pending a hearing on his ability to pay it. We are not persuaded. Appellant did not object in the juvenile court to imposition of the restitution fine on grounds of inability to pay. He has thus forfeited the claim before this court. (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1155, reviewed denied July 17, 2019.)

Even if the claim were not otherwise forfeited, appellant was ordered to pay the *maximum* fine allowable under section 730.6. The statute expressly provides that in imposing such a fine the court "*shall* consider any relevant factors including, but not limited to, the minor's ability to pay . . . ." (§ 730.6, subd. (d)(1), italics added.) The statute also makes clear that "[t]he

consideration of minor's ability to pay may include his . . . future earning capacity" and that "[a] minor shall bear the burden of demonstrating a lack of his . . . ability to pay." (*Id.*, subd. (d)(2)).)

Because appellant failed to object to the $1,000 restitution fine by asserting an inability to pay and he bore the burden of making such a showing, ordinary forfeiture rules apply and preclude appellant from challenging imposition of the restitution fine before this court.[2]

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J. YEGAN, J.

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[2] To the extent appellant asserts that his trial counsel provided ineffective assistance of counsel by failing to object, the assertion fails because nothing in the record on appeal demonstrates that appellant lacked the ability to pay the restitution fine. (See In re S.D. (2002) 99 Cal.App.4th 1068, 1077 [ineffective assistance of counsel can be raised on direct appeal only "in the rare case where the appellate record demonstrates [that] 'there simply could be no satisfactory explanation' for trial counsel's action or inaction"].)

Melissa N. Widdifield, Judge
Superior Court County of Los Angeles

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